81-4

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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PRAMAN CHIRAVACHARDHIKUL
a.k.a. PRAMAN CHIRAVACHARDHIKUL

PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE

RESPONDENT

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTION PRESENTED

Whether the Court erred as a matter of law by affirming the Board of Immigration Appeals interpretation of §212 (c) of the Immigration and Nationality Act to require an alien can only be eligible for §212 (c) relief if he has maintained a domicile in the United States for seven consecutive years <u>after</u> becoming a permanent resident.

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## PETITION FOR WRIT OF CERTIORARI

The petitioner, Praman Chiravacharadhikul petitions for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

## OPINION BELOW

The decision of the Court of Appeals is reported at 645 F. 2d. 248 (1981). The decision is included in the appendix as APPENDIX A.

## JURISDICTION

The judgment of the court of appeals was entered on April 3, 1981. The petitioner's timely petition for re-hearing en banc, was denied May 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 2350.

## QUESTION PRESENTED

Whether the Court erred as a matter of law by affirming the Board of Immigration Appeals interpretation of §212(c) of the

Immigration and Nationality Act to require an alien can only be eligible for §212(c) relief if he has maintained a domicile in the United States for seven consecutive years after becoming a permanent resident.

## STATUTE INVOLVED

Section 212(c), 8 U.S.C. 1182(c), provides:

> §1182. Excludable aliens -- General classes
>
> * * *
>
> Nonapplicability of subsection (a) (1) to (25), (30), and (31)
>
> (c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

## STATEMENT OF THE CASE

The facts in the case are undisputed. Petitioner originally entered the United States on December 14, 1968, as a student under §101 (a)(15)(F)(i) of the Immigration and Nationality Act (hereinafter referred to as F-1). On March 27, 1970, he received a change of status from student (F-1) to employee of Ambassador as defined in §101(a)(15)(A)(ii) of the Act (hereinafter referred to as A-2).

In 1973 Petitioner applied for permanent residency. He remained in that status until entering San Salvador in February 1977 to await the issuance of his permanent residency. He received his permanent residency on February 28, 1977.

Both Petitioner and his wife obtained their immigrant visas on the basis of their child, who was born to them on June 4, 1971 in Washington, D.C., and whose birth registration exempted them from labor certification requirement.

From the time of his change of status to an A-2 on March 27, 1970, the Petitioner exclusively established his residence and domicile in the United States. He currently resides in Alexandria, Virginia.

On March 21, 1978, the Petitioner was convicted in the United States District Court in the District of Columbia for distribution of a controlled substance, to-wit: cocaine in violation of 21 U.S.C. 841(a). He received a sentence of confinement from one year to five years. The execution of that sentence was suspended and he was placed on probation for a period of three years with the special condition that he contribute 200 hours in a community service program without compensation for two (2) years. Subsequent to his conviction, his adjustment to probation was excellent. Also, his community service requirement at the Homeowner's Task Force of the Alexandria Chamber of Commerce was exemplary and his reputation in his work and home community was beyond reproach.

Furthermore, he co-operated fully with the police and prosecutorial authorities. (Note: affidavits in the record support these facts).

Nevertheless, pursuant to the narcotics conviction, an order to show cause and notice of hearing were filed by the Immigration and Naturalization Service on July 25, 1978. Subsequently, Judge Emil Bobek, on September 11, 1978, found the Petitioner deportable and entered an order of deportation. At the hearing, Judge Bobek determined that the petitioner was statutorily ineligible to be considered for relief under §212(c) of the Act, 8 U.S.C. §1182(c) since under the Board of Immigration Appeal's (the Board) interpretation of that section, petitioner did not have the requisite seven year requirement of lawful domicile.

The Board affirmed and stated that relief under §212(c) was inapplicable because it interprets that statute to

require that the seven year domicile be acquired subsequent to the attainment of permanent resident status. Thus, though petitioner had established a domicile in this country for more than the required seven years, §212(c) consideration was denied him because he had not accumulated the seven year period after the procurement of his permanent residency in 1977.

Petitioner subsequently petitioned the Fourth Circuit Court of Appeals for a review of the Board's decision under 8 U.S.C. §1105(a). In the decision rendered by a three judge panel of that Court, the Board's decision was affirmed. Senior Circuit Judge Bryan wrote the opinion for himself and Circuit Judge Widener. Chief Judge Haynsworth dissented and agreed with petitioner's position, to-wit: that petitioner is eligible to be considered for §212(c) relief since he has been admitted for permanent residency and he has maintained a lawful, unrelinquished

domicile in the country for seven consecutive years.

REASONS FOR GRANTING THE PETITION

1. The decision below directly conflicts with another decision of a Court of Appeals wherein the Boards restrictive interpretation of §212(c) was rejected.

The Court below affirmed the Board's interpretation of §212(c)[1] to require that the seven year domicile be acquired subsequent to the attainment by the alien of permanent residence status. That interpretation has been the subject of four Court of Appeals decisions (including our decision) since it was first challenged in Tim Lok v. I.N.S., 548 F.2d 37 (2nd Cir. 1977). There now exists a direct conflict between the Ninth and Fourth Circuits (both two to one split decisions affirming the Boards interpretation) and the Second Cir-

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[1] Although its language refers to the exclusion of an alien, §212(c) also applies to circumstances of deportation. Francis v. I.N.S., 532 F.2d 268 (2d Cir. 1976). This is not an issue in the case.

cuit (a unanimous decision rejecting the Boards restrictive interpretation). It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict presented here.

The restrictive interpretation was rejected by the Second Circuit in Tim Lok, supra, wherein Chief Judge Kaufman wrote for a unanimous panel composed of himself, Judge Friendly and Judge Oakes. The Court reviewed the legislative history and concluded that while Congress clearly intended §212(c) relief to apply to aliens who had achieved permanent residence status, nothing in the wording of the Committee reports or in the law indicated that "lawful unrelinquished domicile of seven consecutive years" had to follow the attainment of permanent residence status. The Court indicated that the most that could be said from the language of the reports was that the section applied to aliens that were permanent residents and who had a

lawful domicile in this country of seven consecutive years, regardless of when that occurred. After careful consideration of the statutory language, Judge Kaufman concluded that the phrase, "lawfully admitted for permanent residence" as defined in 8 U.S.C. §1101 (a)(20), refers to aliens accorded the privilege of residing permanently in this country as immigrants, while "lawful unrelinquished domicile" is not defined in the act, and does not have the same meaning. Tim Lok , 548 F.2d at 40. Therefore, the Court held that even though the alien had not been a permanent resident for seven consecutive years, he was nevertheless eligible to be considered for relief under §212(c).

In 1977 the Board reiterated its interpretation and refused to apply the holding of Tim Lok in cases arising outside the Second Circuit. Matter of Anwo Interim Decision 2604 (BIA 1977). Petitioner Anwo sought relief in the

United States Court of Appeals for the District of Columbia. On June 19, 1979, that Court issued an opinion affirming the Board's decision in the facts of that case, but used an approach that supports our position. Anwo v. I.N.S., 607 F.2d 435 (D.C. Cir. 1979). In a per curiam decision the Court declined to "choose between the conflicting interpretation of the Board and the Second Circuit", Anwo, 607 F.2d, at 437. The Court stated that even if they accepted Tim Lok's interpretation of the statutory scheme, petitioner Anwo still would not succeed. Their reasoning is quite sound:

> We need not now choose between the conflicting interpretations of the Board and the Second Circuit, for we are convinced that even under more permissive Tim Lok standard, Anwo has failed to satisfy §212(c)'s requirement of "lawful unrelinquished domicile of seven consecutive years". Although the word "domicile" is nowhere defined in the Immigration and Nationality Act, it is generally accepted that domicile is not established unless an individual intends to reside perman-

> ently or indefinately in the new location. For at least three of the seven years during which the petitioner claims to have been lawfully domiciled in this country, he held a status of a non-immigrant studen. In order to qualify for a student visa, however, the alien must "enter the United States temporarily and solely for the purpose of pursuing such a course of study and must maintain "a residence in a foreign country which he has no intention of abandoning", 8 U.S.C. §1101(a)(15)(F)(i) (1976). Thus, Anwo could not have established a "lawful domicile" in the United States during the period in which he held a student visa. On the one hand, if Anwo complied with the terms of his visa and did not intend to abandon his residence in Liberia, then he was not "domiciled" in this country; on the other hand, if Anwo did intend to make the United States his permanent home and domicile, then he violated the conditions of his student visa and was not here "lawfully". Under either hypothesis, Anwo cannot satisfy the eligibility requirements of §212(c), Anwo, 607 F.2d at 437.

Important to our argument is that the Court based its decision on the recent Supreme Court decision of Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed 2d 614 (1978). In footnote eight of the Anwo

decision, related here in its entirety, the Court stated:

> Our conclusion that the petitioner cannot be lawfully domiciled in this country while holding a student visa is buttressed by the Supreme Court's recent decision in Elkins v. Moreno, 435 U.S. 647 98 S.Ct. 1338 55 L.Ed 2d 614 (1978). In that case, the Court considered whether non-immigrant aliens admitted under 8 U.S.C. §1101 (a) (15) (G) (iv) (employees of international organizations and their dependants) could acquire Maryland domicile for "in-state" tuition purposes. Although Elkins did not involve an interpretation of the language of §212(c), the Court indicated that under the immigration laws, a non-immigrant student could not lawfully maintain a domicile in this country...Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States. Thus...a non-immigrant student is defined as "an alien having a residence in a foreign country which he has no intention of abandoning...and who seeks to enter the United States temporarily and solely for the purpose of pursuing...a course of study...", §101 (a) (15) (F)...
>
> By including restrictions on intent in the definition of some non-immigrant classes, Congress must have meant aliens to be barred from these classes if their real purpose in coming to the United States

> was to immigrate permanently. Moreover, since a non-immigrant alien who does not maintain the conditions attached to his status can be deported, see §241(a)(9) of the 1952 Act, 66 Stat. 206 as amended, 8 U.S.C. §1251(a)(9)(1976 ed.), it is also clear that Congress intended that, in the absence of an adjustment of status...non-immigrants in restricted classes who sought to establish domicile would be deported, 98 S.Ct at 1349; Anwo, 607 F. 2d at 437 N8.

A month after Anwo was decided, in Castillo-Felix v. I.N.S., 601 F.2d 459 (9th Cir., 1979), the Court of Appeals for the Ninth Circuit had an opportunity to choose between the Board and Tim Lok's interpretation of §212(c) in a non-drug matter. The petitioner, an alien, entered this country illegally in 1963. In November 1969, he was apprehended by the Immigration Service and given leave to depart voluntarily, but re-entered illegally the next day. In October of 1970 he married a permanent resident, and, after a grant of extended voluntary departure, on April 7, 1972, he was lawfully admitted for permanent residence with a visa. In

August of 1975, he was convicted of knowingly inducing entry of two undocumented aliens in violation of §274(a)(4) of the I.N.A. He subsequently conceded deportability and applied for §212(c) relief. In June 1977, the Immigration Judge found the petitioner ineligible because he had not been continuously domiciled in the United States for seven years after his admission for permanent residence. The Board affirmed.

In the Court of Appeals, the petitioner relied on the Tim Lok interpretation of the statute. The Court of Appeals in a split decision stated their belief that the language of §212(c) is ambiguous and could support either in the I.N.S. view or that of Tim Lok. However, the Court parted company with the Second Circuit's conclusion in Tim Lok and agreed with the Board that to be eligible for §212(c) relief the alien must accumulate seven years of lawful unrelinquished

domicile after their admission for permanent residence.

Unlike the petitioner in Anwo, a non-immigrant student as defined by §101 (a) (15) (F) (i), or the petitioner in Castillo-Felix, petitioner, Praman, received a change of status in 1970 from F-1 (student) to A-2 (employee of ambassador). This A-2 status remained intact until he entered El Salvador in 1977 to await the issuance of his immigration visa. Thus, as Chief Judge Haynsworth aptly states, unlike the situations that preceded this case "there is no ambiguity in the application of the statute to him".

Therefore, the threshold question in our petition is as follows: Can Petitioner, Praman, who had accumulated seven years from the commencement of his A-2 status establish a "lawful unrelinquished domicile" of seven consecutive years in the United States so as to be eligible for §212 (c) relief? If Petitioner, Praman,

lived in the Second Circuit, Tim Lok would dictate that this be answered in the affirmative. If Judge Haynsworth's reasoning, as stated in this dissent in our case, or Judge Takasugi's reasoning, as stated in his dissent in Castillo-Felix applied, the answer would likewise be in the affirmative.

Since the 1977 Tim Lok challenge there has already been a direct conflict in the Circuits. Because the issue will likely be litigated in various courts for years to come, the matter must be decided by this Court. The importance of and recurring nature of this issue cannot be overemphasized. Any permanent resident alien, whether subject to exclusion or deportation, who has been domiciled in this country for seven consecutive years, but who has not been a permanent resident for the seven years, is affected by this precise issue. Significantly, the scholarly literature published on this issue also

recognizes the importance of this issue, and, in fact, supports our interpretation of §212(c). Hall, Lawful Domicile Under Section 212(c) of the Immigration and Nationality Act, 47 Univ. of Chi. Law Rev. 771 (1980); Griffith, Relief From Exclusion and Deportation, 15 San Diego Law Rev. 93, 96 (1977); Kramer, Waivers Related to Grounds of Exclusion, 56 Interpreter Releases 527, 529 (1979).

2. The decision below completely ignores the recent opinion of this Court in Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed. 2d 614 (1978).

The Court of Appeals for the District of Columbia in Anwo, supra, properly recognized the significance of this Court's decision in Elkins v. Moreno, to our precise issue. Our Fourth Circuit decision completely ignored the important ramifications of that decision. In Elkins v. Moreno, supra, the Court ruled that aliens classified under §101(a)(15)(G)(iv) of the Act (hereinafter referred to as G-4) are

not precluded by Federal law from acquiring a domicile in the United States. 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed. 2d 614 (1978). This ruling is highly significant to our case.

Under current law, generally aliens are admitted to the United States as either immigrants (aliens lawfully admitted for permanent residence) or non-immigrants within the terms of §101 (a)(15) of the Act. The section specifically restricts some of those sub-categories from intending to make this country their home.

In writing the Court's opinion, Justice Brennan discussed this statutory framework and its relationship to whether or not a certain class within the statutory framework can "lawfully" establish a "domicile" in this country. Justice Brennan stated:

> "Congress expressly conditioned admission for some purposes on an intent not to abandon a foreign residence or, by implication on an intent not to seek domicile in the United

> States...Similarly, a non-immigrant studentis defined as "an alien having a residence in a foreign country which he has no intention of abandoning...and who seeks to enter the United States temporarily and solely for the purpose of pursuing...a course of study."
>
> "But Congress did not restrict every non-immigrant class. In particular, no restrictions on a non-immigrant intent were placed on aliens admitted under §101 (a)(15)(G)(iv)... The conclusion is therefore inescapable that, where as with the G-4 class, Congress, did not impose restrictions on the intent, this was deliberate. Congress' silence is therefore pregnant, and we read it to mean that Congress, while anticipating that permanent immigration should occur through immigrant channels, was willing to allow non-restricted non-immigrant aliens to adopt the United States as their domicile. Elkins v. Moreno, 98 S.Ct. at 1349.

Thus, this Court hasnow made it clear that at least certain non-immigrants can establish a "lawful domicile". By analogy, after restudying the statutory requirements for A-2 non-immigrants, as listed in §101 (a)(15)(A)(ii), it is

clear that one in that status can also establish a "lawful domicile" in the United States. Like his G-4 counterpart, an A-2 non-immigrant is not restricted by having to possess an intent not to abandon a foreign residence, or, by implication, an intent not to seek domicile in the United States. Elkins v. Moreno, 98 S.Ct. at 1349.

In its brief before the Court of Appeals, the respondent states that the Board's position regarding §212(c) is that "a lawful domicile can only be established by an alien lawfully admitted for permanent residence" (see p.22 of Respondent's Brief to the Court of Appeals). That reasoning is erroneous. The Board's misplaced logic is clearly stated in Matter of Anwo, the decision rejecting Tim Lok's interpretation of §212(c) for cases arising outside the Second Circuit. The Board stated that all non-immigrants are "expected to enter,

accomplish the purpose of his visit and to leave within a relatively short period of time." Matter of Anwo, supra, at 5-6. Clearly, Elkins completely repudiates this reasoning. The Fourth Circuit, despite the fact that Elkins was discussed at length by both sides, simply ignores the issue in its entirety. That oversight can only be corrected by this Court.

3. The decision below has used a standard of statutory construction that is in direct conflict with many applicable decisions of this Court.

Even though we contend that the statute on its face clearly supports our position, and Judge Haynsworth in his dissent confirms this view, the majority opinion below agrees with the Ninth Circuit that the statute is "ambiguous". Assuming that the majority is correct in its assumption that the provision is "ambiguous" (see p. 8a of the appendix), the Court adopted an incorrect standard

of statutory construction for this deportation statute. Great reliance is placed on an "admonition" contained in Udall v. Tallman, et al., 380 U.S.1, 16 (1964). However, Udall's "admonition" relates to the Secretary of Interior's construction of two executive orders regarding oil and gas leasing arrangements under the Mineral Leasing Act. That decision has nothing to do with deportation and does not even relate to the interpretation of an act of Congress.

Reliance upon Udall's "admonition" while interpreting a deportation statute establishes a rule of statutory construction that is completely contrary to principles established by the Supreme Court. Since deportation is the severest of sanctions, it is settled doctrine that deportation statutes, if ambiguous, must be construed in favor of the alien.

In 1964, the very year that Udall was decided, the Supreme Court rendered the

decision of Costello v. I.N.S., 84 S.Ct. 580, 376 U.S. 120 (1964). Costello concerned the interpretation of §241(a) of the Act. Justice Stewart, writing for the Court, stated:

> "If, however, despite the impact of §241(b)(2), it should still be thought that the language of §241(a)(4) itself and the absence of leave the matter in some doubt, we would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner. As the Court has emphasized, 'deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 U.S. 388, 68 S.Ct. 10 [92 L.Ed.17]. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his feedom beyond that which is required by the narrowest of several possible meanings of the words used.' Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S.Ct. 374, 92 L.Ed. 433." 84 S.Ct. at 585.

These principles have been stated and adhered to many times. Barber v. Gonzales, 347 U.S. 637, 642-3, 74 S.Ct. 822, 825, 98 L.Ed. 1009 (1954). (The Court in an opinion by Chief Justice Warren, the author of the Udall opinion, interpreted an ambiguous deportation statute in favor of the alien); Bonetti v. Rogers, 356 U.S. 691, 699, 78 S.Ct. 976, 980-1, 2 L.Ed. 2d 1087 (1958). (The Court interpreted an ambiguous deportation statute in favor of the alien relying upon the statutory construction rules referred to in Fong Haw Tan, supra, Delgadillo, supra, and Barber, supra; Rosenberg v. Fleuti, 374 U.S. 424, 457, 83 S.Ct. 1804, 1810, 10 L.Ed. 2 1000 (1963); I.N.S. v. Errico, 380 U.S. 214, 225, 87 S.Ct. 473, 480, 17 L.Ed. 2d 318 (1966) (Chief Justice Warren, two years after his Udall opinion admonishes that, "Even if there were some doubt as to the correct construction of the statute the doubt should be resolved

in favor of the alien".) Lennon v. I.N.S., 527 F.2d 187, 193 (2nd Cir. 1975); Marino v. I.N.S., 537 F.2d 686, 691 (2nd Cir. 1977); Castenada v. I.N.S., 585 F.2d. 1309, 1315 (5th Cir. 1978).

The respondent concedes that there is nothing in the legislative history which states clearly that the Board's interpretation of Section 212(c) is correct (see p.19, nt.12 of Respondent's brief to the Court of Appeals). Indeed, the majority states its opinion that the statute is ambiguous, (see p.8a of the appendix). As such, the Court is obligated to adopt the statutory construction rules as advanced by this Court consistantly time and time again. It is the duty of this Court to correct the error and clarify this issue. Otherwise, the lower courts will be at a loss as to precisely what rule is applicable.

## CONCLUSION

For these reasons a writ of certiorari

should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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Date: _____

# APPENDIX A

Praman CHIRAVACHARADHIKUL a.k.a.
Praman Chiravacharadhijul,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 80-1479

United States Court of Appeals
Fourth Circuit

Argued Feb. 2, 1981

Decided April 3, 1981

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WIDENER, Circuit Judge.

ALBERT V. BRYAN, Senior Circuit Judge:

Praman Chiravacharadhikul seeks review of the Board of Immigration Appeals' (BIA) order denying him eligibility for the discretionary relief from deportation permitted under §212(c) of the Immigration and Nationality Act (the Act),

8 U.S.C. §1182(c).[1] To qualify for such relief, an alien must have acquired a lawful unrelinquished domicile of seven consecutive years." Although Praman had lived continuously in this country for more than the required seven years, the Immigration and Naturalization Service (INS) denied him invocation of the provisions of §212(c) because he had not accumulated the seven-year statutory period of stay after the procurement of

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1. 8 U.S.C. §1182(c):

> Aliens lawfully admitted for permanent residence who temporarily proceed abroad volunatily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section.

This statute is a codification of §212(c) of the Act. Although its language refers to the exclusion of an alien, §212(c) also applies to circumstances of deportation. Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979); Francis v. INS, 532 F.2d 268 (2d. Cir. 1976).

his permanent resident status in 1977. He petitioned this court for review of the decision in July 1980. 8 U.S.C. §1105a. We affirm and accordingly deny petitioner's claim for exoneration from deportation.

Praman, a native of Thailand, came to the United States on December 4, 1968 under a student visa (an F-1). 8 U.S.C. §1101(a)(15)(F)(i). On March 27, 1970 he obtained a job as a chauffeur for the Ambassador of Thailand and he received a change of status under the Act from student to non-immigrant employee for a foreign government (an A-2). 8 U.S.C. §1101(a)(15)(A)(ii). He was married and the couple had a child born in Washington, D.C. on June 4, 1971, but he was separated from his wife at the time of the initial hearing on his petition. Praman applied for permanent residency in 1973. Upon returning from a visit to Thailand in 1975, he entered the country

as a non-immigrant employee. Subsequently, Praman traveled to San Salvador and there obtained a non-preference visa. Upon re-entry to the United States on February 28, 1977 he was admitted as a premanent resident.

On March 21, 1978 in the United States District Court for the District of Columbia, Praman was convicted of the unlawful distribution of a controlled substance and received a suspended sentence of confinement of one to five years. 21 U.S.C. §841(a).

As a result, on July 25, 1978 the District Director of the INS issued an order requiring Praman to appear before one of the judges and show cause why he should not be deported by reason of the criminal conviction. 8 U.S.C. §1251(a)(2).[2] After a full hearing with

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2. 8 U.S.C. §1251(a)(2):

Any alien in the United States (in-

[Ftnt. cont'd. next pg.]

counsel before the Immigration Judge on the shown cause order, Praman was, on September 12, 1978, ordered deported and September 12, 1978 a judgment was entered to that effect. In this proceeding Praman was also found to be "statutorily ineligible" to receive discretionary relief from deportation under §212(c), the judge basing his determination "upon rulings of the Board of Immigration Appeals."[3]

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cluding an alien crewman) shall, upon the order of the Attorney General, be deported who--

* * * * * *

entered the United States without inspection or at any time or place other than as designated by the Attorney general or is in the United States in violation of this chapter or in violation of any other law of the United States. (Accent added.)

Before the Immigration Judge, Praman conceded that deportability was established by his conviction.

3. In its opinion the BIA notes: "In urging reversal of the immigration

[Ftnt. cont'd. next pg.]

On February 1, 1980 the Board of Immigration Appeals dismissed Praman's appeal from the decision of the Immigration Judge, it having concluded that:

> Deportability has been established by clear, convincing and unequivocal evidence.
>
> * * * * * *
>
> The record establishes and we find that the respondent does not have the requisite period of continuous lawful un-relinquished domicile in the United States. See Matter of Newton, Interim Decision 2733 (BIA 1979) and cases cited therein. In any event, section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Even if the respondent were eligible, we would not grant him section 212(c) relief in view of his involvement in distributing cocaine. Accordingly, the appeal will be dismissed.

The Immigration Judge had earlier noted that the keystone for decision in this case was the prior "rulings of the Board of Immigration Appeals." Infra at

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judge's denial of a waiver of deportability, counsel stated, and correctly so, 'We, of course, concede that section 212(c) relief is discretionary.'"

249. His thesis was reaffirmed by the BIA: it looked to the history of its own conclusions, citing in Matter of Newton, Interim Decision 2733 (BIA 1979).[4]

The BIA originally construed §212(c) in Matter of S, 5 I & N Dec. 116 (1953). There it disallowed eligibility to an alien who had resided in the United States for more than seven consecutive years, but had spent only four of them as a permanent resident:

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4. Newton confirmed the BIA's original statutory construction:

> We decline to reconsider our decision in Matter of Anwo in which we set forth our rationale for refusing to recede from a statutory interpretation that has been consistently applied by the Board for some 26 years.
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> * * * * * *
>
> We find that the original of the language now in section 212(c), along with the clear legislative intent in 1952 to restrict the scope of the seventh proviso, support the conclusion that such relief was intended to be available only to aliens acquiring seven years of domicile after their entry for permanent residence.

> In view of the plain language of section 212(c) of the Immigration and Nationality Act ... together with the review of the historical background of the legislation, we come to the conclusion that this provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 118 (accent added).

The soundness of this ratio decidendi was confirmed by the Ninth Circuit in an almost identical factual milieu in Castillo-Felix v. INS, 601 F.2d 459 (1979). Its determination was that reached by the BIA in the review now before us. While recognizing the issue as difficult of resolution, the Court nevertheless decided it with its own reasoning and citation:

> We are left with an ambiguous pro-

vision with little legislative history to clarify how Congress intended it to be applied. The INS, the agency charged with interpreting the immigration laws, first interpreted §1182(c) in 1952 and has adhered to its position for 26 years. We stated in Baur v. Mathews, 578 F.2d 228, 233 (9th Cir. 1978):

> The administrative agency clothed with responsibility for implementing congressional pronouncements is generally well acquainted with the policy of the statute it administers. This is particularly true when the agency has long been involved in the construction and administration of a given statute or its predecessors. Where, as here, the agency has extensive experience, has relied on the common meaning of the relevant statute's specific language, and can point to important congressional purposes furthered by its interpretation, only a clear showing of a contrary intent by Congress will justify overruling the agency's regulations.

See also DHL Corp. v. C.A.B., 584 F.2d 914, 919-20 (9th Cir. 1978); Nazareno v. Attorney General of the United States, 168 U.S.App.D.C. 22, 26, 512 F.2d 936, 940 (1975).

601 F.2d at 465 (accend added) (footnotes omitted).

Castillo-Felix acknowledges the force of the contrary view of Lok v. INS,

548 F.2d 37 (2d Cir. 1977) but rejects its adoption as precedent for the interpretation of §212(c). We agree with the Ninth Circuit for it is incredible to hold that Congress would let stand the unvarying and constant reading of its enactment by the INS for over 26 years if that reading disregarded the Congressional intent. Especially is this convincing of the correctness of the Service's stand when Congress placed the Act in the care of the INS, and continues it, as the body endowed with the expertise and experience indispensable to a fair, reasonable and exacting enforcement of the legislation, so long as the Constitutional rights of persons are not impaired.[5]

We follow the admonition so plainly written in Udall, Secretary of the Interior v. Tallman, et al., 380 U.S. 1,

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5. There are no Constitutional privileges at stake in this litigation

16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1964) that:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n v. Aragon, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136. See also, e.g., Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326 86 L.Ed. 301; Universal Battery Co. v. United States, 281 U.S. 580, 583, 50 S.Ct. 422, 423, 74 L.Ed. 1051.

Here as the BIA's interpretation of the statutory section is neither inconsistent nor unjustified, we uphold the Board's construction which, in its estimation, will better serve the legislative intent and purpose.

Affirmed.

HAYNSWORTH, Chief Judge, dissenting:

I respectfully dissent.

The statute[1] provides for eligibility for the exercise by the Attorney General of his discretion if the returning alien (1) is "admitted for permanent resident," and (2) is "returning to a lawful unrelinquished domicile of seven consecutive years." The statute is now consistently applied to deportation cases so that the requisites for eligibility are that an alien shall have been admitted for permanent residence and that he have a lawful unrelinquished domicile of seven consecutive years. This petitioner clearly meets both branches of the test.

If his presence in this country had been unlawful at any time, we might be confronted with a question whether, during that time, he could have a lawful domicile. There might be some question of whether he could acquire domiciliary status at all if he was here on some

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1. 8 U.S.C.A. §1182(c)

temporary permit, as that issued to students. In 1970, however, he had been classified as a non-immigrant employee of a foreign government. As such, he could lawfully remain indefinitely. See Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614. There was no impediment to his establishment of an entirely lawful domicile, which he did. It had been maintained for more than seven years, though his change in status from that of an employee of a foreign embassy to an immigrant for permanent residence occurred less than seven years ago. There is no ambiguity in the application of the statute to him. Hence, in this case we are not met with the possibly troublesome problems which confronted the Second and Ninth Circuits in Lok v. INS, 548 F.2d (2d Cir. 1977), and Castillo-Felix v. INS, 601 F.2d 459 (9th Cir. 1979).

Even if we were met with those problems, I would come out as the Second Cir-

cuit did. I think Judge Kaufman, writing for a panel composed of himself, Judge Friendly and Judge Oakes, presuasively demonstrated that there is no ambiguity in the statute occasioning extreme deference to administrative interpretation. Moreover, there are no practical problems or policy considerations supporting the administrative interpretation, as the dissenting opinion of Judge Takasugi in Castillo-Felix demonstrates.

The Congress in 1950 considered language which would require the result reached by the majority, but the Congress did not adopt that language. The language it did adopt in 1952 seems to me inconsistent with the subsequent administrative interpretation. I am left with the feeling that the administrative interpretation was born of the administrator's preconceived notion of what should be, rather than of an attempt fairly to construe Congressional purpose and intent.

The question before us is not whether the petitioner should be deported. The statute, as I interpret it, simply means that his case should be submitted to the Attorney General of the United States who, after considering all factors, would be free to exercise his discretion as to whether or not the petitioner should be deported.